

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

OAH NO. 2012030293

DALIA D.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge (ALJ) Humberto Flores, Office of Administrative Hearings, heard this matter in Bakersfield, California, on May 16, 2012.

Jeffrey Popkin, Associate Director, represented the Kern Regional Center (Regional Center). Dalia D. (claimant) appeared at the hearing and was represented by her parents who are also her conservators.

Evidence was received at the hearing and record was closed. The Administrative Law Judge makes the following factual findings, legal conclusions and order.

ISSUES

Should the regional center provide funding for claimant to purchase the food supplement known as Ensure?

FACTUAL FINDINGS

1. Claimant is a 28-year-old woman whose qualifying conditions are severe mental retardation and seizure disorder.
2. Claimant lives with her parents in Mojave, California.

3. Claimant is asking the regional center to pay for the nutritional/food supplement known as Ensure. Claimant's parents asserted at the informal meeting that Medi-Cal had been funding the purchase of Ensure but stopped funding for this service. Claimant drinks three cans of Ensure per day.

4. On April 20, 2011, the regional center notified claimant in a Notice of Proposed Action of its decision denying claimant's funding request for Ensure. Claimant filed a timely Request for Fair Hearing.

5. Claimant's parents testified that claimant does not chew her food and she refuses to eat solid food. Further, when claimant's parents try to encourage her to eat solid food claimant will become extremely agitated and will sometimes experience a seizure. Claimant's seizures have increased over the past year, especially when she attempts to eat solid food. She currently takes seven different medicines to control her seizures, which now average eight times per day.

6. The regional center called Fidel Huerta, M.D., a general practitioner, who testified that claimant's inability or refusal to eat solid food is not related to her developmental disability. Dr. Huerta did not give an opinion as to what he believes causes claimant not to chew her food. He did state, however, that pureed food would provide necessary nutrition and would address claimant's inability or refusal to chew food. At the hearing, claimant's parents testified that they have tried to feed claimant pureed food, but claimant does not like to eat food prepared in that manner and refuses to eat it.

7. Claimant Individual Program Plan (IPP) states in pertinent part under Objective 1: "Dalia is completely dependent on her family and care providers for performance of all daily living skills." Under Objective 2, the IPP states in part: "Dalia will maintain and/or improve standard of health and quality of living, given routine health maintenance, i.e., physical and dental examinations, psychiatric and nutritional counseling, and/or necessary medications, etc., over the next 12 months. Currently Dalia's health is unstable. Her seizure status continues to decline. Dalia is dependent on Ensure nutritional drinks to get vitamins, due to her inability to chew food. Dalia continues to lose weight. . . ."

8. The Non-Residential Annual Review prepared by the Program Manager and claimant's Service Coordinator, states in the Health Care section: "Dalia's seizure status continues to worsen over the past year. She continues to have a reported six different types of seizures. Seizure status continues to be eight grand mal seizures per day. Seizures typically occur during eating, toileting, and at least 3-4 occur during sleep. Parents are looking for a new neuro-specialist. They are concerned with how much trouble she continues to have eating food. Her seizures are reportedly causing her to stop eating; if she has one during mealtimes, she will then lose her appetite. Dalia continues to lose weight and is down to 137 lbs." Under the Nutritional Needs section, the Annual Review states: "Dalia has difficulty eating due to the frequency of seizures which occur during mealtimes. Dalia is given Ensure three times a day. She prefers to eat regular food, but is often fed soft food to help her consume it more easily, due to her increase in seizures over this past year. . . ."

LEGAL CONCLUSIONS

1. In 1977, the California Legislature enacted the Lanterman Developmental Disabilities Services Act (the Lanterman Act) “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (See, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.). Under the Lanterman Act, the “State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge.” (Welf. & Inst. Code, § 4501.)

2. Welfare and Institutions Code section 4512, subdivision (b) of the Lanterman Developmental Disabilities Services Act states in part:

Services and supports for person with developmental disabilities’ means specialized service and supports or special adaptations of generic services and support directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer, or, when appropriate, the consumer’s family, and shall include a consideration of a range of service options proposed by the individual plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to,

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question. Within the bounds of the law each client’s particular needs must be met, taking into account the needs and preferences of the individual and the family. This requires an active participation by the consumer and her legal guardians. (See Welf. & Inst. Code, §§ 4646, subds. (a) & (b), and 4648, subd. (a) (2).)

4. Dr. Huerta opined that claimant’s inability to chew food was not related or caused by her developmental disability. Dr. Huerta did not conduct a physical examination of claimant, which affects the weight given his testimony. Further, Dr. Huerta did not offer an alternative medical reason for claimant’s inability to chew food. In any event, Dr. Huerta further opined that claimant’s inability to chew food could be resolved by simply pureeing

her food. Claimant's parents, who are with her every day, both testified that claimant cannot chew her food and many times refuses to eat pureed food. Further, when she experiences difficulty in eating her food, whether solid or pureed, she becomes extremely agitated, which often results in a seizure and a loss of appetite. The testimony of claimant's parents is supported by claimant's IPP and her Non-Residential Annual Review, as set forth in Factual Findings 7 and 8. Although claimant did not present testimony or documentation from a medical or psychiatric expert indicating that claimant's inability or refusal to chew is the result of her developmental disability, there is no evidence in the record that claimant suffers from a physical disability which prevents her from chewing her food. Therefore, the only logical explanation for her inability to chew her food is a combination of her severe mental retardation and her seizure disorder.

5. Cause exists to overrule the Notice of Proposed Action denying claimant's request for funding for the food/nutritional supplement Ensure.

ORDER

The decision by the Kern Regional Center denying funding to purchase the nutritional supplement Ensure for claimant is overruled. Claimant's appeal is granted.

DATED: May 25, 2012

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision: both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.